STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 20, 2004
v	No. 245357 Macomb Circuit Court
BRIAN MICHAEL SMITH, Defendant-Appellant.	LC No. 2001-000590-FH

Before: Talbot, P.J., Neff and Zahra, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of involuntary manslaughter, MCL 750.321, and two counts of felonious driving, MCL 752.191. He was sentenced to concurrent prison terms of eighty-six months to fifteen years for the manslaughter conviction, and sixteen to twenty-four months each for the felonious driving convictions. He appeals as of right. We affirm defendant's convictions, but remand for resentencing.

This case arises from an automobile collision between defendant and Lawrence Sourvelis on August 25, 2000, on 13 Mile Road in Warren. Sourvelis died from injuries sustained in the crash. Two passengers in defendant's car also were seriously injured. Jessica Diener lost three fingers, and Rachelle Piciurro sustained ear, tendon, and skin injuries. A third passenger, Brian Lacasse, sustained only a minor injury to his finger. Defendant was convicted of manslaughter for Sourvelis' death, and felonious driving for Diener's and Piciurro's injuries.

Physical evidence from the collision scene indicated that defendant was driving between fifty-nine and sixty-five miles an hour when he hit Sourvelis' car. Defendant told the police that he was driving about fifty miles an hour. Piciurro estimated defendant's speed at seventy miles an hour. She also testified that she asked defendant to slow down, but he ignored her. Diener did not recall anything about defendant's speed, but she recalled that he did not brake before the crash. Lacasse told the police, shortly after the collision, that defendant was driving seventy miles an hour, but he testified at trial that defendant was driving at or only slightly above the speed limit. William Hempenstall, who was driving the opposite direction on 13 Mile and passed defendant just before the crash, testified that defendant was driving very fast immediately before the accident.

Defendant was charged with manslaughter and two counts of felonious driving. The prosecution's theory was that defendant's excessive speed constituted gross negligence.

Defendant contended that his speed did not constitute gross negligence, and that the proximate cause of the accident was Sourvelis' failure to wait at the stop sign for traffic to clear before proceeding onto 13 Mile Road. The parties' expert witnesses disputed whether wearing a seat belt would have saved Sourvelis' life. The jury convicted defendant as charged.

On appeal, defendant argues that the evidence was insufficient to establish the gross negligence element of manslaughter and felonious driving, and that his actions did not cause Sourvelis' death. When a defendant challenges the sufficiency of the evidence in a criminal case, this Court considers whether the evidence, viewed in a light most favorable to the prosecution, would warrant a reasonable juror to find guilt beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000); *People v Sexton*, 250 Mich App 211, 222; 646 NW2d 875 (2002).

When a charge of manslaughter, MCL 750.321, is predicated on the careless operation of a vehicle, the prosecution must establish that the defendant was grossly negligent. *People v McCoy*, 223 Mich App 500, 502; 566 NW2d 667 (1997). Proof of gross negligence was also required for defendant's conviction of felonious driving. *Id.*

In order to show gross negligence, the prosecution must establish the following elements:

> (1) Knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another.
>
> (2) Ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand.
>
> (3) The omission to use such care and diligence to avert the threatened danger when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another. [*Id.* at 503.]

Defendant contends that these elements are not satisfied where he was merely speeding, he was not under the influence of drugs or alcohol, and he had no knowledge that Sourvelis would ignore the stop sign and enter 13 Mile Road directly in front of defendant's vehicle.

Defendant correctly states that speeding, by itself, ordinarily does not constitute gross negligence. But, as this Court held in *McCoy, supra* at 504, "under certain circumstances, a violation of the speed limit can be gross negligence." The appropriate consideration is "whether defendant acted with gross negligence under the totality of the circumstances, including defendant's actual speed and the posted speed limit." *Id.* This question is ordinarily for the jury to resolve. *Id.*

Here, the jury could have found that defendant was grossly negligent in light of the totality of the circumstances. Officer Ricotta testified that defendant's speed was the most important factor in determining how the collision occurred. The evidence established not merely that defendant was speeding, but that he was driving, in the middle of the afternoon, twenty-five miles over the legal limit on a four-lane, undivided highway. A driver making a left turn onto the highway from an intersecting street must watch traffic from both directions and determine when he may safely proceed, and there was evidence that it is difficult to accurately judge the

speed of an oncoming car. The jury could have found that defendant's excessive speeding on 13 Mile Road was "likely to prove disastrous," rising to the level of gross negligence, because it prevented Sourvelis from foreseeing that defendant would collide with him before he cleared the westbound lanes. Accordingly, it could have reasonably found, based on the evidence, that defendant's speeding constituted gross negligence.

Moreover, contrary to what defendant asserts, the evidence did not establish that Sourvelis ignored the stop sign. There was no testimony or physical evidence that Sourvelis failed to stop and watch for traffic before attempting his turn. On the contrary, Hempenstall testified that he observed Sourvelis stopped at the intersection, waiting for an opportunity to turn.

Defendant also argues that there was no evidence that he drove under the influence of marijuana. Witnesses testified that Lacasse purchased marijuana shortly before the collision. Although the other passengers testified that no one smoked marijuana before the collision, toxicology results showed that defendant ingested a large amount of marijuana within twelve hours of the incident. The jury could reasonably have concluded that defendant had recently used marijuana and that his driving ability was affected. This was of little significance, however, because the totality of the circumstances permitted the jury to find that defendant's excessive speeding amounted to gross negligence, irrespective of the influence of marijuana.

Defendant also argues that the evidence was insufficient to establish that his conduct caused either Sourvelis' death or Diener's and Piciurro's injuries. Defendant relies on his experts' testimony that these injuries could have been avoided if the victims had worn seat belts. We disagree.

Defendant relies on *People v Moore*, 246 Mich App 172; 631 NW2d 779 (2001). In *Moore*, this Court held in a negligent homicide case that evidence that the decedent was not using a seat belt was relevant to the question of whether the defendant's conduct was a substantial cause of the decedent's death. *Id.* at 178-179. However, the admissibility of the evidence is at not at issue here. Rather, the issue on appeal is whether the jury verdict was contrary to the evidence.

Both parties presented substantial expert testimony on the seat belt issue. There was expert testimony that Sourvelis would have died even if he had used his seat belt. Although defendant's experts presented detailed and plausible theories to the contrary, this Court will not interfere with the role of the trier of fact of determining the weight of the evidence or the credibility of witnesses. *People v Hill*, 257 Mich App 126, 141; 667 NW2d 78 (2003). Consequently, defendant's challenge to the sufficiency of the evidence must fail.

Defendant also contends that the trial court should not have permitted Dr. Werner Spitz to testify as a rebuttal witness. Defendant argues that his expert witnesses, Dr. Lawrence Schneider and James Stocke, were experts in biomechanics and automobile occupant kinetics, not medical experts, and that Dr. Spitz was not a proper witness to rebut their testimony.

This Court reviews a trial court's decision to admit rebuttal evidence for an abuse of discretion. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996). Rebuttal evidence is admissible to "'contradict, repel, explain or disprove evidence produced by the other party and

tending directly to weaken or impeach the same.'" *Id.* at 399, quoting *People v DeLano*, 318 Mich 557, 570; 28 NW2d 909 (1947). In *Figgures, supra*, our Supreme Court held:

> [T]he test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor's case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant. . . . As long as evidence is responsive to material presented by the defense, it is properly classified as rebuttal, even if it overlaps evidence admitted in the prosecutor's case in chief. [Citations omitted.]

Here, the trial court required the prosecutor to lay a foundation to show that Dr. Spitz was qualified to rebut defendant's expert witnesses' testimony. Dr. Spitz testified that he authored and published a textbook, *Medical Legal Investigation of Death*, which included information on the kinetics and movement of individuals in vehicles. During voir dire by defense counsel, Dr. Spitz acknowledged that he did not have an engineering degree, but he stated that his experience as a forensic pathologist involved performing or supervising more than 55,000 autopsies, including victims of motor vehicle accidents. He had published articles on motor vehicle injuries.

The trial court did not abuse its discretion in permitting Dr. Spitz's rebuttal testimony. Defendant argues that Dr. Schneider and Stocke did not give any medical testimony for Dr. Spitz to rebut, but the factual premise of this argument is not entirely correct. Dr. Schneider and Stocke did not dispute the medical examiner's finding that Sourvelis died from a hinge fracture; instead, they disputed her testimony that the collision caused Sourvelis to move toward the B-pillar.[1] However, Dr. Schneider purported to reconcile his theory of an A-pillar/windshield impact with Dr. Loewe's finding when he testified that a hinge fracture along the base of the skull can result from a blow to the front of the head. This was, in essence, medical testimony which bolstered defendant's claim that Sourvelis was killed by a frontward impact that would have been prevented by a seat belt. Thus, the trial court did not abuse its discretion in permitting the prosecution to rebut defendant's theory with evidence that a frontward impact could not have caused the fatal hinge fracture.

Defendant's argument suggests that Dr. Spitz was not qualified to give rebuttal testimony on this point, because his expertise is pathology, not biomechanics or occupant kinetics. We review a trial court's decision to qualify a witness as an expert for an abuse of discretion. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). A witness may be qualified as an expert "by knowledge, skill, experience, training, or education." MRE 702. The question of how Sourvelis sustained the fatal hinge fracture entailed both medical and kinetic expertise. The seat belt/causation issue turned on the related questions of whether Sourvelis' body moved frontward toward the A-pillar or sideways toward the B-pillar, and which theory was consistent with his fatal injury. Dr. Spitz testified that as a forensic pathologist, he was knowledgeable

[1] The "B-pillar," is the strip of metal separating the back seat from the front seat. The "A-pillar" is the strip of metal separating the front, side window from the windshield.

about how bodies move within vehicles after certain kinds of impacts. Accordingly, the trial court did not abuse its discretion in permitting Dr. Spitz to testify as an expert.

Finally, defendant argues that the trial court erred in scoring the legislative sentencing guidelines, specifically offense variables ("OVs") 4, 9, and 18. This Court reviews a sentencing court's scoring decision to determine whether the court properly exercised its discretion and whether the record evidence adequately supports a particular score. See *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "A scoring decision is not clearly erroneous if the record contains '*any* evidence in support' of the decision." *People v Hicks*, 259 Mich App 518, 522; 675 NW2d 599 (2003), citations omitted, emphasis in original.

Defendant challenges the scoring of OV 9. The trial court scored OV 9, number of victims, at ten points, which is appropriate when there are two to nine victims. MCL 777.39(1)(c). MCL 777.39(2)(a) defines "victim" as including "each person who was placed in danger." The trial court correctly noted that there were at least three victims of the collision in this case, Sourvelis, Piciurro, and Diener, not including Lacasse. OV-9 was properly scored.

We agree, however, that the trial court erred in scoring five points for OV 18, which is appropriate where "[t]he offender operated a vehicle . . . while he or she was visibly impaired by the use of intoxicating liquor or a controlled substance." MCL 777.48(1)(d). The trial court acknowledged defendant's claim that there was no evidence of visible impairment, but stated, "There is enough evidence to say that he was not acting in a rational behavior based upon the testimony and based upon the nature of the offense, so I disagree." There was no evidence, however, that defendant was "visibly impaired" for the purposes of scoring OV 18. On the contrary, Detective Ricotta testified that defendant was coherent after the accident and that he was unable to make a judgment as to whether defendant appeared to be under the influence of marijuana. We therefore conclude that the trial court erred in scoring five points for OV 18.

Defendant's total OV score was fifty points, which resulted in a minimum sentence range of forty-three to eighty-six months. MCL 777.64. The trial court sentenced defendant at the highest end of this range. The five point reduction of defendant's score for OV 18 will place him in offense level IV (35-49 points), yielding a reduced minimum sentence range of thirty-six to seventy-one months. MCL 777.64.

We note that defendant also challenges the trial court's ten point score for OV 4, "psychological injury to a victim," MCL 777.34. Although a change in defendant's score for OV 4 would reduce defendant's offense variable score to thirty-five, it would not remove him from offense level IV. MCL 777.64. Defendant's challenge of this offense variable implicitly raises the question whether the Legislature's use of the phrase "a victim," rather than "the victim," in OV 4 permitted the trial court's ten-point score for the psychological injury of Piciurro, who was not the direct victim of the manslaughter but who testified that she has used anti-depressant and sleep medication since the accident. MCL 777.34. Defendant does not develop this argument and in light of our finding that a zero-score for OV 4 would not change defendant's offense level, defendant's challenge is moot and we decline to address it.

Defendant's manslaughter sentence is outside the guidelines range, and, accordingly, we remand for resentencing.

Defendant's convictions are affirmed. His sentences are vacated, and we remand for resentencing. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Brian K. Zahra